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In the

Supreme Court of the United States

October Term, 1982

Van D. Mueller and June E. Noyes, *Petitioners*

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Council for American Private Education, the American Association of Christian Schools International, the Association for Public Justice, the Christian Educators' Association, Christian Schools International, Citizen's for Fairness in Education, the Free Congress Research and Education Foundation, the National Association for the Legal Support of Alternative Schools, the National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education in Support of the Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE BRIEF vii

BRIEF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE INCLUSION OF TAXPAYERS INCURRING EDUCATIONAL EXPENSES AT CHURCH-RELATED SCHOOLS WITHIN A PROGRAM OF GENUINE TAX DEDUCTIONS BROADLY AVAILABLE TO ALL WHO INCUR SUCH EXPENSES IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE 2

A. VALID SECULAR PURPOSE 2

B. NO EXCESSIVE ENTANGLEMENT 10

C. NO DIRECT AND IMMEDIATE EFFECT OF ADVANCING RELIGION 18

II. THE HISTORIC PURPOSE OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT WAS NOT TO PROHIBIT GENERALLY AVAILABLE TAX BENEFITS INDIRECTLY BENEFITING ALL RELIGIOUS BODIES ON A NEUTRAL BASIS, BUT WAS TO PROHIBIT THE GOVERNMENT FROM IMPOSING ANY PARTICULAR DENOMINATIONAL OR SECTARIAN BELIEF OR PRACTICE INVOLUNTARILY ON THE PEOPLE 21

CONCLUSION 29

PROOF OF SERVICE 30

TABLE OF AUTHORITIES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Council for American Private Education (CAPE) is a Washington D.C.-based coalition organization serving elementary and secondary private education. Fifteen national private school organizations comprise the membership of CAPE: the American Lutheran Church; the American Montessori Society; the Association of Evangelical Lutheran Churches; the Association of Military Colleges and Schools of the United States; Christian Schools International; Friends' Council on Education; the Lutheran Church, Missouri Synod; the National Association of Episcopal Schools; the National Association of Independent Schools; the National Association of Private Schools for Exceptional Children; the National Catholic Education Association; the National Society for Hebrew Day Schools; Seventh Day Adventist Board of Education, K-12; Solomon Schechter Day School Association; and the United States Catholic Conference. Together these organizations operate about 15,000 private schools enrolling approximately 4.2 million students, or over 80% of the nation's private school students. Member organizations are non-profit and subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. This brief does not purport to reflect the views of all members of the coalition, but is based upon policies adopted by the Board of Directors of the Council.

The American Association of Christian Schools (AACS) is an Illinois-based, non-profit organization serving approximately 1,100 fundamentalist Christian schools throughout the United States and Canada, with affiliated state organizations in forty states. Nearly all of the member schools are an integral component of autonomous, local Christian churches.

The Association of Christian Schools International (ACSI) is a California-based, non-profit organization, serving approximately 1,900 schools and colleges throughout the United States and Canada. All of the member schools include religious instruction among other subjects normally presented in their curriculum.

The Association for Public Justice (APJ) is a Washington, D.C.-based, non-profit, voluntary association of Christian citizens attempting to address issues of structural justice in many areas of public policy, including the educational arena.

The Christian Educators' Association (CEA) is a non-profit, tax-exempt, California corporation which is a voluntary membership organization of public school teachers and administrators, with over 23,000 members and affiliates. CEA is dedicated to insuring quality education for all students in elementary and secondary education. CEA is concerned with the equitable distribution of the costs of public education and in promoting parental interests in the educational process.

Christian Schools International (CSI) is a Michigan-based, non-profit, voluntary association of approximately 400 Christian schools in the United States and Canada. These schools are generally Calvinistic in their educational philosophy.

Citizens for Fairness in Education (CFE) is a Texas-based, non-profit, voluntary association advocating tax benefits for those who relieve the public school system by sending their children to nonpublic schools.

The Free Congress Research and Education Foundation is a Washington, D.C.-based, non-profit research organization. The Family Policy Division of the Foundation examines public policy matters affecting the integrity and stability of the family, as well as other issues relating to traditional family values.

The National Association for the Legal Support of Alternative Schools (NALSAS) is a national information and legal

service center located in New Mexico. NALSAS is designed to research, coordinate and support legal actions involving non-public educational alternatives. NALSAS helps interested persons and organizations locate, evaluate, and/or create viable alternatives to traditional schooling approaches.

The National Coalition of Alternative Community Schools (NCACS) is a non-profit organization of people engaged in the challenge of securing the benefits of an egalitarian society for all people, regardless of race, religion, sex or age. The members of NCACS believe in utilizing educational processes to develop the full human potential of every individual. NCACS members are from diverse backgrounds and approach the task of creating an economically democratic society through many different means. For example, NCACS assists families who are involved in educating their children at home, and supports the creation of alternative schools that exemplify the concepts of democratic process and self government.

Parents Acting for Choice in Education (PACE) is a New York-based, non-profit organization of people desiring to help parents understand and fulfill their responsibilities toward the education of their children, to promote increased public awareness about the proper role of government in education, and to strive to assure freedom of choice in education for all who desire it.

Amici are religious bodies and voluntary associations of parents and taxpayers. The religious bodies have since colonial times enjoyed the benefit of exemption from the payment of various taxes. This self restraint on the part of the government to exercise its power to tax religious bodies has been upheld by this Court under the Establishment Clause in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970). The concomitant benefit to taxpayers of deductibility of charitable contributions is clearly at issue in the instant litigation.

Other amici are primarily concerned with parental rights in educational matters. These rights are acknowledged as part of the patrimony of humankind in the Universal Declaration of Human Rights adopted in 1948 by the United Nations General Assembly. Over two decades before the adoption of this declaration, this Court unanimously invalidated a provision of the Oregon State constitution that would have eliminated parental choice in the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The legislation challenged in the instant litigation provides a general tax benefit for parents incurring educational expenses whether incurred in public or nonpublic schools. The freedom of parents to choose the form of education they deem appropriate for their children is among the legitimate purposes of this legislation.

Both groups of amici have vital interests in the outcome of this litigation and cannot reasonably expect their views to be presented fully to this Court by the parties. For the foregoing reasons, amici respectfully move this Court for leave to file this brief to urge this Court to reassert its teaching in *Walz* concerning the constitutional permissibility of broad, generally available tax benefits that enable taxpayers to make choices consistent with the general welfare, and its teaching adumbrated in *Pierce* and developed in subsequent decisions concerning familial privacy that parents retain an important interest in exercising educational choice.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The interests of the amici in the instant litigation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. The inclusion of taxpayers incurring certain educational expenses at church-related schools within a general program of genuine tax deductions broadly available to all who incur such expenses is permissible under the Establishment Clause:

(a) The statute has the *valid secular purpose* of promoting pluralism and diversity among public and nonpublic schools;

(b) The statute law does not require *excessive entanglement* between the government and religious bodies; and

(c) The statute does not have the *direct and immediate effect* of advancing religion.

II. The historic purpose of the Religion Clauses of the First Amendment was not to prohibit generally available tax benefits indirectly benefiting all religious bodies on a neutral basis, but was to prohibit the government from imposing any particular denominational or sectarian belief or practice involuntarily on the people.

ARGUMENT

I. THE INCLUSION OF TAXPAYERS INCURRING CERTAIN EDUCATIONAL EXPENSES AT CHURCH-RELATED SCHOOLS WITHIN A PROGRAM OF GENUINE TAX DEDUCTIONS BROADLY AVAILABLE TO ALL WHO INCUR SUCH EXPENSES IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE.

A. Valid Secular Purpose

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan,* 446 U.S. 646 (1980), Justice White wrote:

> Establishment Clause cases are not easy, they stir deep feelings, and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. *id.* at 662.

Although Establishment Clause cases are not easy, this Court has never adopted the view that this Clause supports an attitude of hostility towards religious institutions that might derive some indirect benefit from a genuine tax deduction provision generally available to all citizens of a state, such as the legislation challenged in this litigation.

The basic purpose of the Establishment Clause is, of course, "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission of City of New York,* 397 U.S. 664, 669 (1970). As Chief Justice

Burger stated in *Walz*, short of expressly proscribed governmental acts that would either establish religion or interfere with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *id.*

In this case there is no direct governmental subsidy of any particular religious group or of religious groups in general. To the contrary, the State of Minnesota made a reasonable and reasoned decision nearly three decades ago to recognize the validity of a healthy pluralism and diversity in education, and to refrain from collecting additional revenue from taxpayers who incur certain educational expenses arising at any eligible school, whether public or nonpublic.

Several of the amici supporting the Petitioners urge this Court to invalidate the challenged legislation on the ground that any benefit, however remote and indirect, derived from the statute by nonpublic schools is an assault on the fiscal stability of Minnesota's public schools. *See, e.g.* Brief Amicus Curiae of National School Boards Association (NSBA) and Brief Amicus Curiae of Minnesota Association of School Administrators et al. It should not, however, be imagined that the members of the Minnesota Legislature, many of whom are or have been public school teachers or administrators, remotely contemplated the undermining of that state's excellent public school system by the enactment of the challenged legislation, which benefits parents of children attending public as well as nonpublic schools. Nor should it be thought that the Establishment Clause can or should be used as a bludgeon to strike down any and all forms of support, however indirect, for nonpublic education. The Religion Clauses were adopted long before states had public school systems and cannot fairly be viewed as protecting an absolute monopoly of governmental resources for the schools that the government maintains and operates.

It is, moreover, regretable that the twin values of governmental neutrality in religious matters and parental freedom in the education of their children should be viewed as competing or in conflict with one another. At a recent conference in Washington, D.C., John J. Gilligan, a prominent public policy maker who has served in the legislative and executive branches of government at the local, state, and federal levels, expressed concern over the fruitless character of pitting these values against one another. Referring to his experience as Govenor of Ohio, Gilligan noted:

> My own experiences as Governor of Ohio in the early Seventies, in a state which had its fair share of all of the problems afflicting education today, convinced me that there were two major impediments to dealing successfully with our educational problems. First, there was the propensity of those in government to think in terms of an educational institution which had passed into oblivion 15 or 20 years earlier. In other words, they tended to think in terms that no longer applied to the current situation, and to deal with the problems of an earlier period rather than those of the present or the future.
>
> Second, and even more threatening to any hope of finding a solution to the problems of the Eighties and Nineties in the field of education, was the evident instict of educators and educational administrators — perhaps understandable in the light of what appeared to be dwindling moral and financial support for education — to divide the educational universe into separate and rival domains and duchies: public schools against private; academic programs versus vocational training; suburbs against central cities; underprivileged children versus the affluent; minorities against majority. That

tendency seemed to me then, and seems to me now, to accomplish nothing in terms of advancing the interests of one sector of education in relation to other, but rather to provide ammunition to those who were seeking any and every rationale for curtailing support to education as a whole. Participants in this kind of fratricidal strife were — and are — thus inflicting serious damage on the very enterprise they profess to defend and serve. "Foreword" in E. Gaffney, ed., *Private Schools and the Public Good: Policy Alternatives for the Eighties* viii (1981).

Another participant at this conference echoed this theme. Denis P. Doyle wrote:

> The conventional wisdom in much of the public and private sector holds that a major change in the way we finance education — adding private schools to the public expense ledger — is essentially a zero sum game. I would argue that, at least on the basis of comparative research, that is clearly not the case. The zero sum fear is based on a false assumption that the education pie is finite, and that even a small slice for private education will diminish public education . . . . the old conditions of support for public education are today on very shaky ground. But rather than viewing private education with suspicion and hostility, supporters of the public school system might gain, both financially and politically, by looking to the private sector for allies in the effort to adopt a strategy of support for education as a whole. The crucial question, of course, is whether or not the gains that private schools would enjoy would be offset by losses in the

> public sector. While we cannot answer the question definitely, the strongest evidence comes from Australia, where one third of the students are enrolled in private schools supported by public funds. Every indication suggests that there is now a much more broadly-based coalition of support for education in general and that the levels of support for education in the public sector alone are higher now than they would have been absent general support for education generally, both public and private. *Id.* at 78.

It is this kind of pluralistic, educational philosophy that undergirds the statute challenged by the instant litigation. In the historic decision of *Brown v. Bd. of Education* 347 U.S. 483 (1954) this Court acknowledged the vital role that education of the citizenry plays in a democratic society, calling education "perhaps the most important function of state and local governments . . . the very fundation of good citizenship . . . [and] a principal instrument in awakening the child to cultural values." *Id.* at 493. A similarly unanimous Court recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) that in a free and open society the government may not monopolize the transmission of meaning and value. As Justice McReynolds stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. *id.* at 535.

Justice Douglas, moreover, observed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it has disadvantages. The main one is that a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of individual idiosyncrasies. *Id.* at 630 (Douglas, J. concurring).

To counteract this danger of totalitarian transmission of culture, this Court has recognized "the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). In *Wolman v. Walter*, 433 U.S. 229 (1977), Justice Blackmun wrote that "the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education" *id.* at 240; Justice Powell observed that "the State has a legitimate interest in facilitating education of the highest quality for *all children* within its boundaries, *whatever school their parents* have chosen for them." *Id.* at 262 (Powell, J., concurring and dissenting) (emphasis supplied). See also S. Arons, *Compelling Belief: The Culture of American Schooling* (1982); Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harv. Ed. Rev.* 76 (1976); D. Kommers and M. Wahoske, eds., *Education and Freedom: Pierce v. Society of Sisters Reexamined* (1978); and R. McCarthy, J. Skillen, and W. Harper, *Disestablishment A Second Time: Genuine Pluralism for American Schools* (1982).

In enacting the statute challenged in this case, the Minnesota Legislature clearly intended to further the legitimate interest of the State in providing quality education for all children in that state, irrespective of whether the school attended by those children is owned and operated by the government or by other groups. Article VI, § 3 of the United States Constitution requires all state legislators as well as executive officers to take an oath of office that binds them to the same duty undertaken by judges to uphold the Constitution of the United States. *See* L. Tribe, *American Constitutional Law* 13-14, 27-28 (1978). This often overlooked fact supports the presumption of constitutionality that a validly enacted statute traditionally has enjoyed. *See, e.g., McGowan v. Maryland* 366 U.S. 420, 496 (1961). This presumption of constitutionality means that the statute challenged in the instinct case should be seen as a bona fide effort of the Legislature and the Governor of the State of Minnesota to promote the legitimate interests of the State in nondiscriminatory, quality education for all children in that state, and in diverse, pluralistic forms of educational experience.

Petitioners would have this Court invalidate the challenged statute on the sole ground that it lacks a valid, secular legislative purpose. (Petitioners' Brief, 67-76). One of the amici supporting the Petitioners likewise assails the validity of the purpose of this legislation, characterizing the facially neutral distribution of tax benefits in the statute as "a farce and a subterfuge." Brief Amicus Curiae of the Baptist Joint Committee on Public Affairs, at 12.

To accept the invitation of the Petitioners and of amici supporting them to reject the stated purpose of this legislation and to adopt the purpose that the Petitioners regard as "evident" would be to stray far beyond the record in this case. It would, moreover, run contrary to a virtually unbroken line of precedents in the Establishment Clause area. In *Epperson v.*

Arkansas, 393 U.S. 97 (1968), this Court invalidated a statute that made it unlawful "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" on the ground that this statute was motivated not by a valid secular purpose but by a fundamentalist belief in the literal reading of the Book of Genesis. *Id.* at 109. *Epperson*, however, did not involve any form of state aid to nonpublic education.

The only decision of this Court relied upon by Petitioners or amici supporting them is *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Far from supporting the Petitioners' convention that this Court should invalidate the Minnesota statute on this ground, *Nyquist* stands for the opposite conclusion. In *Nyquist*, Justice Powell wrote:

> we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt — indeed, we fully recognize — the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools. *Id.* at 773.

All the other relevant precedents of this Court, support the finding of the Court of Appeals that the Minnesota legislature had a valid secular purpose in enacting the statute. See, e.g., *Bd. of Education v. Allen,* 392 U.S. 236, 243 (1968); *Walz v. Tax Commission,* 397 U.S. 664, 672-674 (1970); *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971); *Tilton v. Richardson,* 403 U.S. 672, 678-679 (1971); *Sloan v. Lemon,* 413 U.S. 825, 827-828 (1973); *Hunt v. McNair,* 413 U.S. 734, 741-742 (1973); *Meek v. Pittenger,* 421 U.S. 349, 363 (1979); *Roemer v. Bd. of Public Works of Maryland,* 426 U.S. 736, 754 (1976); *Wolman v. Walter,* 433 U.S. 229, 236 (1977); *Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 653-654 (1980); *Widmar v. Vincent,* 454 U.S. 263, 271-272 (1981); *Larson v. Valente,* 456 U.S. 228, 102 S. Ct. 1673, 1687 (1982); *Larkin v. Grendel's Den,* ____ U.S. ____, 103 S. Ct. 505, 508 (1982). This Court should accept the finding that the challenged legislation has a valid secular purpose.

B. No Excessive Entanglement

This Court should likewise reject the Petitioner's attempt to confuse the secular purpose and excessive entanglement tests. Petitioners suggest that the Minnesota Legislature is faced with a dilemma. On the one hand, if it integrates this statute into its tax code, with the usual provisions for auditing tax returns to detect unlawful use of a tax provision, it would not be sufficiently rigorous in enforcing the prohibition against establishing religion. On the other hand, if it were to adopt what the Petitioners themselves characterize as a "Draconian measure" of auditing every return, it would be guilty of entangling itself excessively with religious groups. (Petitioner's Brief at 66). This false dilemma is hardly of Sartrean dimen-

sions, for the "Catch-22" solution devised by the Petitioners, if it can be called a solution, is not required by the precedents of this Court. As Chief Justice Burger, the principal author of the excessive entanglement test, *Walz, supra,* and *Lemon, supra,* has written:

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional. *Tilton v. Richardson,* 403 U.S. at 679.

See also Ripple, "The Entanglement Test of the Religion Clauses – A Ten Year Assessment," 27 *U.C.L.A. L. Rev.* 1195 (1980); Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 *U. Pitt. L. Rev.* 673 (1980); and Serritella, "Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts," 44 *L. and Contemp. Problems* 143 (1981).

Indeed, it is precisely the avoidance of excessively intrusive governmental contacts with religious bodies that led this Court to sustain a similarly broadly available tax benefit in *Walz v. Tax Commision, supra.* In order to avoid this inescapable conclusion, Petitioners have characterized the deduction from gross income allowed by the Minnesota statute as "a government subsidy of the favored activity." (Petitioners' Brief at 25, and passim, especially at 50-62). To do so, however, is to misunderstand the nature of the tax benefit afforded by the legislation at issue in this case. In *Walz,* Chief Justice Burger wrote concerning property tax exemption, a similar exercise of self-restraint on the part of government of its power to collect

revenues, as follows:

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. . . . The government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll." *Walz,* 397 U.S. at 32-33. See also at 680-694, (Brennan, J., concurring).

In a similar vein, a leading authority on Church-State matters, Dean M. Kelley, has written:

> The beauty of "tax exemption" as an arrangement for encouraging voluntary organizations is that it does not entail . . . entanglements and dependencies. . . . At least it does not oblige government to examine, inspect, evaluate, compare, audit, standardize regulate, or control such organizations, as would be the case if they were subsidized. Rather than attempting to assess their worth to the public as a basis for determining the degree of subsidy they deserve, government — by the mechanism of tax exemption — allows the *public* to make that evaluation and decision directly by the degree to which interested persons support the various organizations by their voluntary contributions. *Why Churches Should Not Pay Taxes* 32 (1977).

Kelley notes several operational distinctions between genuine subsidies and tax provisions that are passive in nature, such as

exemptions or deductions whereby the government forebears to collect revenue:

> 1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits; ". . . government does not transfer part of its revenue. . . ."
>
> 2. A tax exemption, in and of itself, *does not provide one cent* to an organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain — by tax exemption — any organization which does not attract contributions on its own merits.
>
> 3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no "amount" involved in a tax exemption because it is "open-ended"; the organization's income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.
>
> 4. Consequently, there is *no periodic legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or to oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them. *Id.* at 33.

Shortly before *Walz* was decided, Boris I. Bittker, Sterling Professor of Law at Yale Law School, wrote:

> There is no way to tax *everything;* a legislative body,

no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has jurisdiction those that, in its view, are appropriate objects of taxation. In specifying the ambit of any tax, the legislature cannot avoid "exempting" those persons, events, activities or entities that are outside the territory of the proposed tax. In describing a tax's boundaries, the draftsman may choose to make the exclusions explicit ("All property except that owned by nonprofit organizations"), or implicit ("all property owned by organizations operated for profit"), but either way, the result is the same — taxpayers are separated from nontaxpayers. . . .

The federal income tax of current law, then, "exempts" nonprofit groups; and this quite naturally leads, on a quick glance, to the conclusion that they have been granted the "privilege" of "immunity." . . . Unless blinded by labels, however, one can view the federal income tax instead as a tax on income that inures in measurable amounts to the direct or indirect personal benefit of identifiable natural persons. So viewed, the Internal Revenue Code's "exemption" of nonprofit organizations is simply a way of recognizing the inapplicability to them of a concept that is central to the tax itself. Bittker, "Churches, Taxes and the Constitution," 78 *Yale L.J.* 1285, 1288, 1290-1291 (1969).

More recently Bittker and George Rahdert concluded:

The exemption of nonprofit organizations, from federal income taxation is neither a special privilege

nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit. Bittker and Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L.J.* 299, 357-358 (1976).

Because of the passive character of the deduction at issue in this case, it is inappropriate to apply the same expectations of governmental regulation and control that frequently arise as conditions of a direct subsidy. For that reason, this Court should affirm the decision of the Court of Appeals that the Minnesota statute is not infirm by virtue of entangling the government excessively with religious bodies.

The Petitioners themselves have not pressed the claim that the Minnesota statute should be invalidated under the second aspect of the entanglement test. Several of the amici supporting the Petitioners, however, argue that this Court should invalidate the Minnesota statute because of its potential for political divisiveness along religious lines. *See, e.g.* Amicus Brief of Baptist Joint Committee on Public Affairs at 21-24, Amicus Brief of National Committee for Public Education and Religious Liberty et al. at 6-7, and Amicus Brief of National School Boards Association (NSBA) at 36-37. One such brief, for example, urges this Court to assure, "at all costs, the *absolute* separation of church and state . . . so that over the years, we will be certain to avoid the devastating consequences seen in places such as Iran." Amicus Brief of NSBA at 36 (emphasis in original).

Such counsel not only ignores the tendency of this Court "to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes" *Committee for Public Education and Religious Liberty v. Regan,* 446 U.S.

at 662, but also typifies the sort of "imaginable but totally implausible evils" to which Justice Marshall referred in his opinion in *Wolman v. Walter*, 433 U.S. at 260, n.6. The record, of course, is bare of any factual determinations to support these fears of the amici supporting the Petitioners. Nevertheless, this Court may wish to use this case to re-evaluate its position on the political divisiveness aspect of the excessive entanglement test. If it were to do so, it would not thereby be unleashing an avalanche of political Ayatolahs or even causing this country to slip down the perilous slope to Iran. For as long as this Court sits, there need be no fear that so overt and direct a relationship between the government and religious bodies generally or any religious body in particular would ever be tolerated. As Justice Powell observed in *Wolman, supra:*

> The risk of significant religious or denominational control over our democratic processes — or even of deep political division along religious lines — is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. *Wolman*, 433 U.S. at 263 (Powell, J., concurring and dissenting).

Moreover, as Justice Stewart observed in *Harris v. McRae*, 428 U.S. 297 (1980) the mere coincidence that a statute may coincide with the religious tenets of a particular church does not, without more, contravene the Establishment Clause. *Id.* at 319-320.

If this Court chooses to address the political divisiveness

theme, it should be aware, as Professor Tribe has put it, that:

> American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, and education. To view such religious activity as suspect, or to regard its political activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression — and might not even succeed in keeping religious controversy out of public life, given the "political ruptures caused by the alienation of segments of the religious community." L. Tribe, *American Constitutional Law* 866-867 (1978) (footnotes omitted).

Since, moreover, there is no reliable historical evidence supporting the view of Professor Freund, "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680 (1969), on which this Court relied in *Lemon, supra,* when the test was created, it may be time for the Court to abandon the political divisiveness aspect of the excessive entanglement test. See Gaffney, "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy." 24 *St. Louis U. L. J.* 205 (1980); and Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 *U. Pitt. L. Rev.* 673 (1980).

C. No Direct and Immediate Primary Effect of Advancing Religion

The most crucial test under the Establishment Clause for scrutinizing the Minnesota statute is the primary effect test, to which the Respondents devote considerable attention in their briefs. See also the careful discussion of the appropriate way of stating the primary effect test in the Amicus Brief filed by Citizens for Educational Freedom. As articulated most recently in *Larkin v. Grendel's Den*, ____ U.S. ____, 103 S. Ct. 505 (1982) this test requires that legislation not have the "direct and immediate effort of advancing religion." *Id.* at 508. A "remote and incidental effect advantageous to religion institutions" is not a sufficient basis to strike down a statute. *Id.*

The Minnesota statute challenged in this litigation is part of a broad program of tax benefits provided by the State to effectuate a wide variety of important public policy objectives. For example, the Minnesota tax code provides that in computing net income for state income tax purposes a taxpayer may deduct from gross incomes certain trade or business expenses and expenses for the production of income, MINN. STAT, § 290.09.2; all interest, *id.* § 290.09.3; taxes such as those paid to any other state, or inheritance taxes, *id.*, § 290.09.4; uncompensated losses, *id.*, § 290.09.5; bad debts, *id.*, § 290.09.6; depreciation, *id.*, § 290.09.7; medical expenses, *id.*, § 290.09.10; expenditures incurred in exploring and developing mineral resources, *id.*, § 290.09.25; and expenses incurred arising from the adoption of a child, *id.*, § 290.09.27. Petitioners seek to isolate subdivision 22 of § 290.09, providing for a deduction from gross income of certain educational

expenditures incurred at racially nondiscriminatory[1] public and nonpublic schools, and to characterize this provision as a direct governmental subsidy for paying a "user fee." Petitioners have not adduced any evidence that their novel way of characterizing the challenged provision correctly reflects the intent of the Minnesota Legislature. Even if this provision were intended as a special benefit for user fees, that fact alone would not suffice to invalidate the provision, any more that the provision for deductions for medical expenses or any of the other expenses enumerated above. See also § 213 of the federal Internal Revenue Code (providing a deduction from gross income for medical and dental expenses).

The challenged provision, then, does not have the direct and immediate primary effect of advancing religion. To the contrary, by refraining from defining a taxpayer's net income as including certain educational expenses, whether incurred at a public or a nonpublic school, the statute merely has the effect of allowing taxpayers to choose voluntarily to undertake such expenses.

As was suggested above in the discussion of valid secular purpose, the Minnesota Legislature may enact a statute intended to foster a healthy sense of pluralism and diversity in the transmission of meaning and value. To insist that such a statute has the direct and primary effect of advancing religion is to misconstrue the passive character of tax deductions. It is

[1]The Minnesota statute challenged here makes available a deduction only if the allowable expenditures are incurred at a school in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As was stated in the motion for leave to file this brief, p. vii, *supra*, amici subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. Hence the question presented in *Bob Jones University v. United States*, No. 82-3, is not at issue here. For a careful statement of the value of nonpublic schools for promoting racial integration on a voluntary basis, see the Brief Amicus Curiae filed in this case by the Catholic League for Religious and Civil Rights.

to insist that the government may not even refrain from collecting a certain portion of revenues from taxpayers incurring certain legitimate educational expenditures at public or nonpublic schools. And it is to neglect the point that government need not (and after *Pierce, supra,* may not) monopolize the education of children. As Dean Kelley has stated:

> Many of the services performed and activities undertaken by exempt organizations are at least as meritorious and constructive as those for which tax funds are appropriated by the legislatures of the land. Just because government has the power to tax does not mean that governmental expenditures are of greater value, wisdom, effectiveness, or importance than nongovernmental ones; often quite the opposite. And citizens who try to carry out such constructive nongovernmental voluntary undertakings should be encouraged rather than penalized for doing so. They each already pay their (presumably) fair share of taxes; they should not be taxed again for what they voluntarily contribute to endeavors that help to strengthen the fabric of society (and which, in the case of churches, may also be performing an essential social function). Instead, they should be encouraged in such activities by the neutral, self-assessing, and self-allocating incentives of tax exemption and deductibility of contributions. D. Kelley, *Why Churches Should Not Be Taxed* 90-91 (1978).

In *Nyquist, supra,* the beneficiary class appeared to this Court to be so narrow as to require invalidation of the New York tax benefit challenged in that case. Here there is a true deduction rather than a credit, which cannot fairly or accurately be described as a direct governmental subsidy. The

breadth of the beneficiary class in the Minnesota statute, moreover, requires that this statute be sustained, *Nyquist*, 413 U.S. at 782, note 38, citing *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and *Bd. of Education v. Allen*, 392 U.S. 236 (1968).

As in *Walz, supra*, churches are not singled out for special, favorable treatment; rather schools operated by religious bodies are included along with other independent schools (such as the Montessori schools and military academies) and with public schools as eligible institutions which a taxpayer's dependent children may attend. As in *Walz*, moreover, it is not merely these church-related schools which might derive some incidental and remote benefit from the tax provisions for deductions from gross income, but also a host of other charitable organizations, private business enterprises, doctors and dentists and the like. The statute, in short, does not have the immediate and direct effect of advancing religion, and should therefore be sustained.

II. THE HISTORIC PURPOSE OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT WAS NOT TO PROHIBIT GENERALLY AVAILABLE TAX BENEFITS INDIRECTLY BENEFITING ALL RELIGIOUS BODIES ON A NEUTRAL BASIS, BUT WAS TO PROHIBIT THE GOVERNMENT FROM IMPOSING ANY PARTICULAR DENOMINATIONAL OR SECTARIAN BELIEF OR PRACTICE INVOLUNTARILY ON THE PEOPLE.

This Court has often made use of legal history as a way of discharging its responsibility of explaining to the nation the

reasons that undergird its constitutional holdings. *See, e.g., Larkin v. Grendel's Den,* 103 S. Ct. at 510 (1982); *Larson v. Valente,* 102 S. Ct. at 1683-1684 (1982); *McDaniel v. Paty,* 435 U.S. 618 (1978); *Lemon v. Kurtzman,* 403 U.S. 602, 625-642 (1971) (Douglas, J., concurring), and 642-661 (Opinion of Brennan, J.); *Walz v. Tax Commission,* 397 U.S. 664, 676-680 (1970), 681-687 (Brennan, J., concurring), and 704-727 (Douglas, J., dissenting), *Abington School District v. Schempp,* 374 U.S. 203, 230-304 (1963) (Brennan, J., concurring), and *Everson v. Bd. of Education,* 330 U.S. 1 (1947) and 63-72 (Rutledge, J., dissenting). Some legal scholars have written approvingly of the Court's use of history in *Everson.*[2] But the overwhelming majority of legal commentators has been sharply critical of the Court's use of history in *Everson* and other Establishment Clause cases.[3]

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[2]*See, e.g.,* R. Butts, *The American Tradition in Religion and Education* (1950); R. Dixon, "Religion, Schools and the Open Society," 13 *J. Pub. L.* 267, 278 (1964); L. Pfeffer, "The Case for Separation," in J. Cogley, Ed., *Religion in America: Original Essays on Religion in a Free Society* (1968).

[3]*See, e.g.,* E. Corwin, "The Supreme Court as a National School Board," 14 *Law & Contemp. Probs.* 3 (1949); E. Norman, *The Conscience of State in North America* (1964); J. O'Neill, *Religion and Education Under the Constitution* (1949); C. Rice, *The Supreme Court and Public Prayer* (1964); C. Antieau, A. Downey, E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964); M. Howe, *The Garden and the Wilderness* (1965); A. Sutherland, "Historians, Lawyers, and 'Establishment of Religion,' " in D. Gianella, Ed., V *Religion and the Public Order* 27 (1969); L. Levy, "No Establishment of Religion: The Original Understanding," in *Judgments: Essays on American Constitutional History* 169 (1972); W. Berns, *The First Amendment and the Future of American Democracy* (1976); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

Whether this Court should rely on legal history in its opinions is itself a debatable matter.[4] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp*, 374 U.S. at 234 (Brennan, J., concurring). On the other hand, it should not be thought that "an awareness of history and an appreciation of the aims of the Founding Fathers" is without relevance to contemporary constitutional adjudication, or that the Justices should as a matter of course refrain from referring to legal history when that is appropriate. Indeed, it should be recalled that the view of Justice Brennan mentioned above was expressed within his most expansive account of the history underlying the Religion Clauses, *Schempp* 374 U.S. at 230-304 (Brennan, J., concurring).

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized

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[4]*See, e.g.*, C. Miller, *The Supreme Court and the Uses of History* (1969), and literature cited therein.

here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. M. Malbin, *Religion and Politics,* note 3, *supra,* at 9, 15.

A more recent historical study confirms Malbin's conclusions. Professor Robert Cord summarizes his own findings as follows:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. R. Cord, *Separation of Church and State,* note 3, *supra,* at 15.

Opponents of legislation such as that under review in the instant case frequently make reference to the anti-establish-

ment perspective of James Madison. For example, Madison's famous Memorial and Remonstrance in the Virginia House of Burgesses against Patrick Henry's proposal to use public funds to support Christian teachers of religion has been attached to dissenting opinions in *Everson*, 330 U.S. at 63-72, and *Walz*, 397 U.S. at 719-727. Historians have noted the weakness of relying on the struggle in Virginia over Patrick Henry's bill as a way of understanding the mind of the Framers. For example, Professor Leonard Levy writes:

> [T]he details of no other state controversy over church-state relationships are so familiar. If, however, one is concerned with attempting to understand what was meant by "an establishment of religion" at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals. Indeed, the abortive effort in Virginia to enact Patrick Henry's assessment bill is less important than the fact that five states actually had constitutional provisions authorizing general assessments for religion, and a sixth (Connecticut) provided for the same by statute. Had the assessment bill in Virginia been enacted it would simply have increased the number of states maintaining multiple establishments from six to seven. L. Levy, "No Establishment of Religion: The Original Understanding," note 3, *supra*, at 201.

It was Madison, moreover, who suggested that the meaning of a constitutional provision is to be ascertained from considering the "true sense in which it was adopted by the states." Letter to Thomas Ritchie, September 15, 1821, in G. Hunt, Ed. IX *Writings of James Madison* 272 (1909). At the Virginia convention in 1788 called to ratify the new

Constitution adopted in Philadelphia, Madison himself stated:

> Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. . . . The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest. J. Elliott, Ed., III *Debates on the Federal Constitution* 330 (1836).

Professors Antieau, Downey, and Roberts have suggested that the views expressed at the Delaware General Assembly, which ratified the First Amendment on January 27, 1790, were fairly representative of the prevailing view in the other ratifying states. Antieau and his colleagues summarized those views as follows:

> The people of Delaware had come to believe during the period of the ratification of the First Amendment that participation in religious exercises should be voluntary. This did not mean that the state must be blind to religion as an institution in the lives of her citizens; the morality and prosperity of the community depended upon religion. Thus the state could recognize and protect religion, provided that this official recognition was extended on a nonpreferential basis. . . . C. Antieau et al., *Freedom from Federal Establishment,* note 3, *supra,* at 147.

In this view, the Religion Clauses were understood to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious

groups." *Id.* at 160; see also W. Berns, *The First Amendment and the Future of American Democracy* (1976).

When Madison was elected to the First Congress and served as floor manager of the First Amendment, he did not depart from this view that the First Amendment was intended to prohibit a nationally preferred religion. This may be seen in the version of the First Amendment that Madison submitted to the House of Representatives: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789).

Madison also endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter to M. L. Hurlbert, May, 1830, in G. Hunt, Ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the Respondents. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau et al., *Freedom from Federal Establishment* (1964), and R. Cord, *Separation of Church and State* (1982).

The original meaning of the Establishment Clause is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude

all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833).

If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by this Court in *Everson*. As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978).

The Minnesota statute challenged in this case conforms to the original purpose and intent of the Establishment Clause. The statute is neutral on its face, and in its operation it is utilized by parents with students in public as well as private schools. The statute, which has been in effect for twenty-seven years, has not resulted in the domination of any particular religion in Minnesota.

By affirming the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to prohibit all forms of state assistance to church-related education (even passive restraints such as exemption from payment of property tax or, as was later to develop, the sort of genuine tax deduction at issue here), but to prohibit the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge that this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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NOTE: Paul Lewis (J.D. Cand., 1983, Notre Dame Law School) and Robert Casey (J.D. Cand., 1983, Notre Dame Law School) were of assistance on this brief.

CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of February, 1983, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn to according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of the Council for American Private Education et al. in support of the Respondents to the following attorneys of record:

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EDWARD McGLYNN GAFFNEY, JR.

Sworn to and Subscribed before me
the day and year aforesaid.

Rosemary K. Reiter, Notary Public